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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 BRENT CLARK,

12 Petitioner,

13 v.

14 J. GASTELO, Warden,

15 Respondent.
16

Case No.: 16CV1803-AJB(JMA)

**REPORT AND
RECOMMENDATION TO
GRANT RESPONDENT'S
MOTION TO DISMISS**

17 Petitioner Brent Clark is a state prisoner, proceeding without counsel, with
18 a petition for a writ of habeas corpus ("Petition") pursuant to 28 U.S.C. § 2254.
19 [Doc. No. 1.] Petitioner challenges his 2004 conviction for kidnapping for robbery,
20 Cal. Pen. Code § 209(b)(1); forcible copulation, Cal. Pen. Code § 288a(c)(2);
21 robbery, Cal. Penal Code § 211; and burglary, Cal. Penal Code § 459. [*Id.*]
22 Respondent has filed a motion to dismiss, arguing the Petition must be dismissed
23 because Petitioner's claims are barred by the one-year statute of limitations.
24 [Doc. No. 10.] On January 17, 2017, Petitioner filed a brief in opposition to the
25 motion to dismiss, contending that his Petition should be considered timely
26 because he is entitled to equitable tolling, and on March 20, 2017, he filed
27 supplemental exhibits in support of his equitable tolling argument. [Doc. Nos. 15
28 & 16.] After careful consideration, the undersigned determined the Court's record

1 was insufficient and allowed Petitioner the opportunity to further develop the
2 record. [Doc. No. 17.]

3 Thereafter, Petitioner filed a supplemental brief and lodged some additional
4 medical records, but not his complete file for the relevant time period. [Doc. Nos.
5 27 & 31.] In a separately filed motion he explained that although he was in
6 possession of his complete CDCR mental health file, due to the large number of
7 documents (estimated to be 800-1200 pages), he could not provide the Court
8 and Respondent with a full and complete set without an order directing California
9 Men's Colony State Prison to make the copies. [Doc. No. 37.] In the interim,
10 counsel for Respondent independently obtained a full and complete copy of
11 Petitioner's mental health records from CDCR. The Court ordered, therefore,
12 Respondent to file under seal and serve on Petitioner a complete copy of
13 Petitioner's CDCR mental health records and, to avoid a duplication of efforts,
14 denied Petitioner's motion for copies without prejudice. [Doc. No. 38.] Once the
15 medical records were filed, the Court allowed Petitioner the time and opportunity
16 to review the records provided by Respondent and further supplement the record
17 if he determined the Court's record was still not complete. [Doc. Nos. 41, 42.]
18 Petitioner did not file any further briefing or medical records. On December 6,
19 2017, Respondent filed a supplemental reply brief. [Doc. No. 43.] Having
20 considered the parties' briefing and Petitioner's CDCR mental health records for
21 the relevant time period, the Court RECOMMENDS Respondent's motion to
22 dismiss be GRANTED, as explained below.

23 **I. Introduction and Procedural Background**

24 Petitioner's efforts to challenge his conviction commenced with an appeal
25 to the California Court of Appeal, in which he argued the trial court erred by: (1)
26 failing to conduct a fifth hearing on his competency to stand trial; and (2) granting
27 his request for self-representation despite his incompetence. [Doc. No. 11-1, Lod.
28 No. 1.] The Court of Appeal rejected these claims on the merits and affirmed the

1 judgment on January 25, 2008. Petitioner then petitioned the California Court of
2 Appeal for review of both claims. [*Id.*] The California Supreme Court denied
3 review on May 14, 2008. [Doc. No. 11-2, Lod. No. 2.]

4 The record indicates Petitioner did not take any further action to challenge
5 his conviction for more than six years, until June 16, 2015, when he filed a
6 motion in the San Diego Superior Court to modify his sentence by striking his
7 restitution fine and reducing it to \$200. [Doc. No. 11-3, Lod. No. 3.] The motion
8 was denied on July 20, 2015. [*Id.*] Petitioner then filed a notice of appeal on
9 August 4, 2015. [Doc. No. 11-4, Lod. No. 4.] The California Court of Appeal
10 dismissed the appeal on September 3, 2015, finding the Superior Court's order
11 was not appealable because it did not affect Petitioner's substantial rights, and
12 noting the Superior Court lost jurisdiction to resentence Petitioner once the
13 execution of his sentence commenced. [Doc. No. 11-5, Lod. No. 5.]

14 On January 21, 2016, Petitioner filed a habeas petition in the Superior
15 Court, claiming (1) his trial and appellate counsel were ineffective in failing to
16 raise and investigate issues relating to sentencing; (2) the trial court abused its
17 discretion in failing to dismiss one or more strike allegations; (3) the trial court
18 should not have permitted him to waive counsel because he was mentally
19 incompetent; and (4) the trial court should not have permitted him to represent
20 himself because of his mental incompetence. [Doc. No. 11-6, Lod. No. 6.] On
21 March 3, 2016, the Superior Court found the habeas petition was "procedurally
22 barred for being untimely." [Doc. No. 11-7, Lod. No. 7, at 3-4.] The court also
23 rejected Petitioner's ineffective assistance of counsel claims as conclusory and
24 ruled Petitioner's sentencing error claim was "fatally flawed" because Petitioner
25 was sentenced as a violent sex offender under California's One Strike law, Cal
26 Pen. Code § 667.61, not as a recidivist under California's Three Strikes law, Cal.
27 Pen. Code § 667(b)-(i). [*Id.* at 3-5.] Finally, the court found Petitioner's
28 competency-related claims were not cognizable on habeas corpus because

1 those claims were raised and rejected on direct appeal. [*Id.* at 5.] The next day,
2 March 4, 2016, the Superior Court denied Petitioner's second motion to modify
3 his sentence by reducing the restitution fine, ruling it did not have jurisdiction to
4 modify the sentence because more than 120 days had passed since sentencing,
5 and that Petitioner waived his right to challenge the restitution fine by failing to
6 object at sentencing. [Doc. No. 11-8, Lod. No. 8.]

7 On March 28, 2016, Petitioner filed a notice of appeal in the California
8 Court of Appeal, challenging the Superior Court's denial of his motion to modify
9 his sentence. [Doc. No. 11-9, Lod. No. 9 at 2.] Two days later, on March 30,
10 2016, he also filed a notice of appeal of the Superior Court's denial of his habeas
11 petition. [Doc. No. 11-10, Lod. No. 10.] On April 7, 2016, the Court of Appeal
12 addressed Petitioner's notice of appeal relating to the habeas petition, construing
13 the filing as a petition for writ of habeas corpus and denying habeas relief on the
14 basis his petition was untimely filed. [Doc. No. 11-11, Lod. No. 11.] The following
15 day, April 8, 2016, the Court of Appeal addressed Petitioner's attempt to appeal
16 the Superior Court's denial of his second motion to modify his sentence,
17 upholding the trial court's finding that it lacked jurisdiction to modify the sentence.
18 [Doc. No. 11-12, Lod. No. 12.]

19 On April 25, 2016, Petitioner filed a habeas petition in the California
20 Supreme Court, raising the same claims that he raised in the habeas petitions
21 filed in the lower state courts. [Doc. No. 11-13, Lod. No. 13.] Thereafter, on May
22 10, 2016, Petitioner also filed a petition for review with the California Supreme
23 Court, raising identical claims. [Doc. No. 11-14, Lod. No. 14.] The California
24 Supreme Court denied the petition for review on June 15, 2016, and on June 22,
25 2016, it denied the habeas petition. In both cases, the Supreme Court's denial
26 was made without comment or citation to authority. [*Id.*]

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1 On July 6, 2016, Petitioner constructively filed the present Petition, raising
2 the same claims that he raised in his state habeas petitions.¹ As discussed
3 below, the Petition should be dismissed with prejudice because it is time-barred.

4 **II. The Petition is Time-Barred under the AEDPA**

5 The AEDPA's one-year statute of limitations applies to Petitioner's federal
6 habeas corpus claims. *Calderon v. U.S. District Court (Beeler)*, 128 F.3d 1283,
7 1286-87 (9th Cir. 1997), as amended on denial of reh. and reh. en banc, cert.
8 denied, 522 U.S. 1099 (1998), overruled on other grounds in *Calderon v. U.S.*
9 *District Court*, 163 F.3d 530 (9th Cir. 1998), cert. denied, 523 U.S. 1063 (1999).
10 Pursuant to 28 U.S.C. § 2244(d)(1):

11 A 1-year period of limitation shall apply to an application for a
12 writ of habeas corpus by a person in custody pursuant to the
13 judgment of a State court. The limitation period shall run from the
latest of --

14 (A) the date on which the judgment became final by the
15 conclusion of direct review or the expiration of the time for seeking
16 such review;

17 (B) the date on which the impediment to filing an
18 application created by State action in violation of the Constitution or
19 laws of the United States is removed, if the applicant was prevented
from filing by such State action;

20 (C) the date on which the constitutional right asserted was
21 initially recognized by the Supreme Court, if the right has been newly
22 recognized by the Supreme Court and made retroactively applicable
23 to cases on collateral review; or

24 (D) the date on which the factual predicate of the claim or
25 claims presented could have been discovered through the exercise of
due diligence.

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27 ¹ See *Anthony v. Cambra*, 236 F.3d 568, 574-75 (9th Cir. 2000) (applying "mailbox rule" which
28 provides for the constructive filing of court documents as of the date they are submitted to
prison authorities for mailing to the court).

1 28 U.S.C. § 2244(d)(1)(A)-(D). Here, pursuant to 28 U.S.C. § 2244(d)(1)(A), the
2 conclusion of direct review of Petitioner's conviction occurred on August 12,
3 2008, ninety (90) days after the California Supreme Court denied Petitioner's
4 petition for review on May 14, 2008. See Rule 13(1), U.S. Sup. Ct. Rules; *Bowen*
5 *v. Roe*, 188 F.3d 1157, 1159-60 (9th Cir. 1999). Accordingly, absent any
6 applicable tolling, Petitioner had until August 13, 2009 to file his federal habeas
7 petition. *Id.*; *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001).
8 Petitioner, however, did not constructively file his federal habeas petition until
9 July 6, 2016, 7 years, 10 months and 23 days after his judgment became final.
10 Thus, it is untimely unless Petitioner is entitled to statutory or equitable tolling for
11 at least 6 years, 10 months and 23 days of this time period.

12
13 **A. Statutory Tolling**

14 The AEDPA tolls its one-year limitations period for the "time during which a
15 properly filed application for State post-conviction or other collateral review . . . is
16 pending." 28 U.S.C. § 2244(d)(2). "An application for post-conviction review is
17 pending while a California petitioner completes a full round of state collateral
18 review, including during the period between (1) a lower court's adverse
19 determination, and (2) the prisoner's filing of a notice of appeal, provided that the
20 filing of the notice of appeal is timely under state law." *Waldrip v. Hall*, 548 F.3d
21 729, 724 (9th Cir. 2008) (citations and internal quotations omitted, emphasis in
22 original). In California, "[a]s long as the prisoner filed a petition for appellate
23 review within a 'reasonable time,' he could count as 'pending' (and add to the 1-
24 year time limit) the days between (1) the time the lower state court reached an
25 adverse decision, and (2) the day he filed a petition in the higher state court."
26 *Evans v. Chavis*, 546 U.S. 189, 193 (2006) (citing *Carey v. Saffold*, 536 U.S. 214,
27 222-23 (2002)). In the absence of a "clear indication that a particular request for
28 appellate review [in state collateral review proceedings] was timely or untimely,

1 the [court] must itself examine the delay in each case and determine what the
2 state courts would have held with respect to timeliness.” *Chavis*, 546 U.S. at
3 197. It cannot be inferred from a decision on the merits, or a decision without
4 explanation, that the California court concluded the petition was timely. *Banjo v.*
5 *Ayers*, 614 F.3d 964, 968 (9th Cir. 2010) (*citing Chavis*, 546 U.S. at 194). “A
6 California court’s determination that a filing was untimely, however, is
7 dispositive.” *Id.* (*citing Saffold*, 536 U.S. at 226).

8 Here, no statutory tolling is available to Petitioner. His conviction became
9 final on August 12, 2008, but he did not take measures to seek any post-
10 conviction relief until June 16, 2015, more than six years and ten months later.
11 Statutory tolling is unavailable where a petitioner files his first application for post-
12 conviction review after the one-year statute of limitations has expired. See
13 *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Statutory tolling may only
14 pause, not revive the statute of limitations. *Ferguson v. Palmateer*, 321 F.3d 820,
15 823 (9th Cir. 2003).

16 Furthermore, the post-conviction filings were not “properly filed,” so as to
17 warrant tolling. Petitioner’s state habeas petitions were denied by the California
18 courts as being untimely.² An application rejected by a state court as untimely is
19 not “properly filed” for purposes of § 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S.
20 408, 417 (2005). This is true even where, as here, the state courts also deny
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23 ² Petitioner’s state habeas petitions were expressly denied by the Superior Court and Court of
24 Appeal as being untimely. [Doc. No. 11-7, Lod No. 7 at 3-4; Doc. No. 11-11, Lod. No. 11 at 2,
25 Thereafter, the California Supreme Court adopted the lower court’s ruling and issued summary
26 denials of the habeas petition and petition for review from the Court of Appeal’s denial of the
27 habeas petition. [Doc. No. 11-15, Lod. No. 15 & Doc. No. 11-16, Lod. No. 16.] See, e.g., *Ylst v.*
28 *Nunnemaker*, 501 U.S. 797, 111 S. Ct. 2590, 2594-96, 115 L. Ed. 2d 706 (1991) (“look
through” applies where a silent state appellate court order follows lower court’s imposition of
procedural default); *Townsend v. Knowles*, 562 F.3d 1200, 1205 (9th Cir. 2009) (looking
though silent denials of California Supreme and court of appeal to trial court’s untimeliness
denial), abrogated on another ground by *Walker v. Martin*, 562 U.S. 307 (2011).

1 relief on other grounds, including the merits. *Bonner v. Carey*, 425 F.3d 1145,
2 1148-49 & n.13 (9th Cir. 2005).

3 Petitioner's motion for resentencing and subsequent appeal were also not
4 "properly filed" for purposes of statutory tolling because the state courts lacked
5 jurisdiction. [Doc. No. 11-5; Lodgment 5.] "If . . . an application is erroneously
6 accepted by the clerk of a court lacking jurisdiction . . . it will be pending, but not
7 properly filed." *Artuz v. Bennett*, 531 U.S. 4, 9 (2000); *See also Stone v. Martel*,
8 No. CIV S-10-3454 KJM, 2011 WL 5828019, at *10 (E.D. Cal. Nov. 18, 2011)
9 (motion for modification not properly filed where court lacked jurisdiction to
10 provide requested relief.) (cf. Doc. Nos. 11-3 & 11-8, Lod. Nos 3 & 8 and Doc.
11 Nos. 11-5 & 11-12, Lod. Nos. 5 & 12.) Petitioner is not, therefore, entitled to any
12 statutory tolling and his federal habeas petition is time-barred unless he can
13 show he is entitled to equitable tolling for at least 6 years, 10 months, and 23
14 days of the time that lapsed between when his judgment became final and the
15 filing of his Petition.

16 **B. Equitable Tolling**

17 The one year statute of limitations for filing a federal habeas petition may
18 be equitably tolled if extraordinary circumstances beyond a prisoner's control
19 prevent the prisoner from filing on time. *See Holland v. Florida*, 560 U.S. 631,
20 645 (2010). A petitioner seeking equitable tolling must establish two elements:
21 "(1) that he has been pursuing his rights diligently, and (2) that some
22 extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S.
23 408, 418 (2005). The diligence required is "reasonable diligence," not "maximum
24 feasible diligence." *See Holland*, 560 U.S. at 653; *see also Bills v. Clark*, 628
25 F.3d 1092, 1096 (9th Cir. 2010).

26 The Ninth Circuit has articulated a specific, two-part test for an equitable
27 tolling claim based on a petitioner's mental impairment:

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1 (1) First, a petitioner must show his mental impairment was an
2 “extraordinary circumstance” beyond his control by demonstrating
3 the impairment was so severe that either

4 (a) petitioner was unable to rationally or factually to personally
5 understand the need to timely file, or

6 (b) petitioner’s mental state rendered him unable personally to
7 prepare a habeas petition and effectuate its filing.

8 (2) Second, the petitioner must show diligence in pursuing the claims
9 to the extent he could understand them, but that the mental
10 impairment made it impossible to meet the filing deadline under
11 the totality of the circumstances, including reasonably available
12 access to assistance.

13 *Bills*, 628 F.3d at 1099-1100; *see also Orthel v. Yates*, 795 F.3d 935, 938 (9th
14 Cir. 2015) (“A petitioner seeking equitable tolling on the grounds of mental
15 incompetence must show extraordinary circumstances, such as an inability to
16 rationally or factually personally understand the need to timely file, or a mental
17 state rendering an inability personally to prepare a habeas petition and effectuate
18 its filing.”).

19 A petitioner alleging a severe mental impairment during the filing period is
20 not entitled to an evidentiary hearing unless he or she makes “a good faith
21 allegation that would, if true, entitle him to equitable tolling.” *Laws v. Lamarque*,
22 351 F.3d 919, 921 (9th Cir. 2003) (remanding for consideration of whether the
23 petitioner’s delayed filing was “attributable to psychiatric medication which
24 deprived Petitioner of any kind of consciousness” where the petitioner had
25 demonstrated “evidence of serious mental illness” by attaching prison psychiatric
26 and medical records); *Bills*, 628 F.3d at 1099-100 (remanding where the
27 petitioner was in the lowest percentile for verbal IQ, verbal comprehension and
28 working memory, and, according to clinical psychologists, was incapable of
inferential thinking necessary to complete a federal habeas form); *see also*

1 *Orthel*, 795 F.3d at 939-40 (“Where the record is amply developed, and where it
2 indicates that the petitioner’s mental incompetence was not so severe as to
3 cause the untimely filing of his habeas petition, a district court is not obligated to
4 hold evidentiary hearings to further develop the factual record, notwithstanding a
5 petitioner’s allegations of mental incompetence.”) (*quoting Roberts v. Marshall*,
6 627 F.3d 768, 773 (9th Cir. 2010).)

7 Here, Petitioner alleges he has been under the care of the prison mental
8 health system for a “major mental illness” since November 2004. [Doc. No. 15,
9 pp. 1-2.] He reports his diagnosis is Bipolar/Mood Disorder and Major
10 Depression and during this time he has taken Zyprexa 15 mg, Depakote 1500
11 mg, Buspar 30 mg, Cogentin 2 mg, Lamictal 50 mg, Vistaril 100 mg, and
12 Propranolol 10 mg. [*Id.* at 2.] He states his “mental illness coupled with the
13 medications and there affects” created an “extraordinary circumstance” that
14 made it “physically impossible” for Petitioner to pursue his claims in the judicial
15 system. [*Id.*] He further represents his medications “have changed throughout the
16 years causing at times “additional obstructions” due to side effects that “at times”
17 have been suicidal thoughts and a deeper depression causing crisis bed
18 observations and mental health transfers.” [*Id.*] He also contends his medication
19 has caused him to suffer from tremors of the hand and other parts of the body
20 that, while physical in nature, have taken a mental and emotional toll that
21 affected his concentration, reading and writing. [Doc. No. 27, pp. 5 of 12.]
22 Petitioner’s claims are supported by the declaration of Christopher Griffith, a self-
23 described “jailhouse lawyer,” who states he believes Petitioner’s mental health
24 circumstances prevented him from filing a federal habeas petition. [*Id.* Doc. No.
25 15, pp. 6-7.] Petitioner has also provided a declaration, in which he represents
26 his medications have played a “major part” in preventing him from pursuing
27 federal habeas relief. [Doc. No. 20.]

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1 As explained above, the statute of limitations started running on August 13,
2 2008 and, absent any applicable tolling, Petitioner had until August 13, 2009 to
3 file his federal habeas petition. During this time, Petitioner received regular
4 psychiatric treatment; however, with one exception and for a period of only eight
5 days, neither Petitioner's mental health, nor the side effects of his medication
6 were so debilitating they could have prevented Petitioner from filing his Petition in
7 a timely manner.

8 **Petitioner is not Entitled to Equitable Tolling from August 13 to**
9 **November 12, 2008**

10 A progress note made on August 12, 2008, the day before the limitations
11 period began to run, indicates Petitioner was alert, fully oriented and had fair
12 insight. [Doc. No. 41, Lod. No. 17, Mental Health Records ("MHR") at 1499³.] The
13 psychiatrists he saw between August 13, 2009 and November 12, 2009, regularly
14 observed Petitioner's thought processes were linear and goal directed [MHR
15 1498, 1489, 1478, 1476, 1477] and that he was stable on medication [MHR
16 1486-87, 1477, 1471-72]. He also participated in Social Skills/Communications
17 Skills and Substance Abuse Medication Management Groups during this time,
18 during which the group facilitators consistently observed Petitioner's cognition to
19 be appropriate. [MHR 1492, 1494, 1496, 1482-85, 1473-75, 1471-72.] On
20 October 10, 2008, Petitioner reported he was not having any overt psychological
21 distress and his psychologist noted Petitioner demonstrated integration of
22 positive coping skills. [MHR 1479.]

23 **Petitioner is Entitled to Equitable Tolling from November 13 – 20, 2008**

24 On November 13, 2008, about three months after the limitations period
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27 ³ Lodgment No. 17 is referred to hereafter as "MHR" and the page numbers cited by the
28 Court in reference to this submission are the Bates numbers that appear on the lower right
hand corner of this filing.

1 began, Petitioner experienced a mental health crisis. That day he was assigned a
2 GAF score of 29 and referred to a crisis bed.⁴ [MHR 1469-1470.] Fortunately,
3 Petitioner's condition improved thereafter. On November 20, 2008, he was
4 assigned a GAF score of 45 and discharged.⁵ [Doc. No. 31 at 5; MHR 1468.] The
5 mental health progress notes from the Substance Abuse/Medication
6 Management group he attended on November 21, 2008, indicate his cognition
7 was appropriate and his insight was good. [MHR 1462.] He participated in other
8 groups on November 24 and 25, 2008, at which time he was again observed to
9 have appropriate cognition and good insight. [MHR 1465, 1467.] On November
10 26, 2008, he was seen by E.V. Roth, PhD, a psychologist, to whom he reported
11 that he was "doing better now" and had "no further (mental health) complaints."
12 [MHR 1463.] Dr. Roth opined that Petitioner was stable on medication and had
13 appropriate cognition. [*Id.*] He was also seen by a staff psychiatrist that day, who
14 observed his thought process to be linear and goal directed and assigned him a
15 GAF score of 50. [MHR 1464.] The period during which Petitioner was
16 incapacitated and unable to pursue federal habeas relief was fairly short-lived,
17 and limited to the eight day period (November 13 - 20, 2008) he was housed in
18 the mental crisis bed.

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23 ⁴ A GAF score in the 21 – 30 range indicates behavior is considerably influenced by delusions
24 or hallucinations or serious impairment, in communication or judgment (e.g., sometimes
25 incoherent, acts grossly inappropriately, suicidal preoccupation) or inability to function in
26 almost all areas (e.g., stays in bed all day, no job, home, or friends) Am. Psychiatric Ass'n,
Diagnostic and Statistical Manual of Mental Disorders (Michael B. First ed., 4th ed. 2000)
(DSM) at 32.

27 ⁵ A GAF score in the 41 – 50 range indicates serious symptoms (e.g., suicidal ideation, severe
28 obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or
school functioning (e.g., no friends, unable to keep a job, cannot work). DSM at 34.

Petitioner is not Entitled to Equitable Tolling for the Remainder of the Statute of Limitations Period (November 21, 2008 to August 21, 2009)

The records for the remainder of the statute of limitations period, which, allowing for eight days of equitable tolling, was extended to August 21, 2009, do not indicate Petitioner was prevented from filing his federal habeas petition due to extraordinary circumstances beyond his control. As explained above, Petitioner's mental health crisis ended on November 20, 2008, and Petitioner was stable for the remainder of that month. Petitioner's mental health continued to be strong in December 2008, when he was observed to be "quite stable." [MHR 1461.] Notes his psychologists made throughout the month indicate his orientation, thought processes and content were within normal limits. [MHR 1456, 1459, 1460.] On December 24, 2008, Petitioner expressed concern that his V.A. benefits would be cancelled and reported he was in the process of addressing the situation. [MHR 1459.] At that time he appeared to be psychiatrically stable and had no involuntary movements. [*Id.*] On December 30, 2008, Petitioner reported he was "doing well," was not experiencing any side effects from the medication, but felt his thinking was slow. [MHR 1455.] The psychiatrist who saw him that day noted Petitioner was not experiencing any side effects from medication, was alert and oriented and his thought process was reasonably clear. [*Id.*] Petitioner was assigned a GAF score of 50. [*Id.*] Petitioner attended multiple groups throughout the month where his cognition was consistently observed to be at an appropriate level. [MHR 1454, 1457-58.]

Petitioner's mental health continued to remain stable through January 2009. [MHR 1444-52.] Clinician progress notes made throughout the month indicate his orientation, memory, thought process and thought content were within normal limits. [MHR 1449-50, 1452.] On January 15, 2009, he reported he'd had difficulty sleeping and was having panic attacks but his new antidepressant prescription seemed to be helping. [MHR 1451.] He expressed

1 concern about transferring to a different prison and was experiencing involuntary
2 movement in his hands and arms. [MHR 1450.] Later in the month, on January
3 22, 2009, Petitioner reported some depression, but said the depression subsided
4 when he learned that he would remain in the EOP building. [Doc. No. 31 at 13;
5 MHR 1449.] His psychologist noted Petitioner displayed no “symptoms of a major
6 mental illness,” appeared to be “psychiatrically stable” and had “good insight” into
7 his mental illness. [MHR 1449.] On January 27, 2009, Petitioner reported
8 increased anxiety, paranoia and frustration with his neighbor, who kicked the wall
9 throughout the day. [Doc. No. 31 at 12; MHR 1446.] His psychologist observed
10 Petitioner was in “some psychiatric distress,” referring to an increase in paranoid
11 delusional material. [*Id.*] Petitioner’s thought content was positive for paranoid
12 ideation; however, his attention, concentration and thought process were normal.
13 [*Id.*] Petitioner requested an increase in his medication dosage and was referred
14 to a psychiatrist, who met with him the same day. [*Id.*] The psychiatrist observed
15 Petitioner’s thought process to be linear and goal-directed and assigned him a
16 GAF score of 55.⁶ [Doc. No. 31 at 11; MHR 1445.] Petitioner displayed no
17 abnormal involuntary movements that day. [MHR 1453.] He participated in
18 multiple groups in January 2009, where his cognition was consistently rated as
19 appropriate. [MHR 1444, 1447-48.]

20 Throughout the spring and summer of 2009, Petitioner continued to be
21 mentally stable, did not exhibit any significant side effects from his medications
22 and demonstrated he was capable of handling his personal matters. During the
23 month of February, his treating clinicians regularly assessed his orientation,
24 attention, memory, concentration, thought process and content to be normal.
25 [MHR 1436-37, 1441-42.] On February 3, 2009, he reported he had moved to a
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28 ⁶ “A GAF score between 51 and 60 indicates ‘[m]oderate symptoms [or] ... moderate difficulty
in social, occupational, or school functioning.’” DSM at 34.

1 different cell, was not depressed, and was happy that he would remain in the
2 EOP building. [Doc. No. 31 at 11; MHR 1443.] He told his psychologist
3 “something” was found during his recent colonoscopy and he would sign a DNR
4 request if the news were bad. [*Id.*] The psychologist noted Petitioner continued
5 to progress in a positive fashion. [*Id.*] The following week Petitioner reported a
6 decrease in involuntary movements and displayed improvement in psychiatric
7 functioning. [Doc. No. 31 at 10; MHR 1442.] Throughout the month he was
8 observed to be functioning within normal limits [MHR 1437, 1440-41] and on
9 February 27, 2009, he was assigned a GAF score of 60 [MHR 1436]. Petitioner’s
10 cognition was to be deemed appropriate by the facilitators for all the groups he
11 participated in that month. [MHR 1435, 1438-39.]

12 On March 5, 2009, Petitioner told the psychologist, “Everything is fine. I got
13 things situated.” [MHR 1434.] During that meeting he was observed to be alert,
14 oriented, with linear thought process, rational thought content, and normal
15 attention, cognition and memory. [*Id.*] On March 17, 2009, he acted
16 appropriately, talked freely and exhibited no incoherent thoughts, but displayed
17 some paranoia about his medication. [MHR 1432.] Progress notes from two days
18 later indicate Petitioner was calm and cooperative and exhibited no bizarre
19 ideation except for his fear that someone was tampering with his medication.
20 [MHR 1431.] On March 23, 2009, Petitioner reported that he was
21 having panic attacks and wanting to isolate. [MHR 1430.] The following day he
22 reported he was doing fairly well, discussed advanced directives with his
23 psychiatrist, and agreed to consider leaving his body to science. [MHR
24 1429.] The psychiatrist noted Petitioner’s tremors had stopped with the
25 discontinuation of Depakote and assigned a GAF score of 65.⁷ [*Id.*] Throughout
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28 ⁷ A GAF score between in the 61 – 70 range indicates “some mild symptoms (e.g. depressed mood and mild insomnia) or some difficulty in social, occupational, or school functioning (e.g.,

1 the month Petitioner's cognition was rated as appropriate or oriented by group
2 facilitators. [MHR 1423 – 27.]

3 In April 2009, Petitioner's cognition and behavior was reported to be normal
4 [MHR 1422], his thinking was clear and rational and he displayed no psychiatric
5 symptoms [MHR 1417-18]. On April 9, 2009, Petitioner reported "I am feeling
6 good... and (am) not really having any mental health issues." [MHR 1422.]
7 Three days later, on April 12, 2009, his psychologist observed Petitioner
8 appeared somber and tense and reported he was having a problem getting his
9 money, but remarked that he had it better than most. [MHR 1421.] On April 17,
10 2009, Petitioner again reported he was "doing very well" and that he wanted to
11 donate his body to science, but was not sure if his wife would allow that. [MHR
12 1419.] He expressed a desire to execute a DNR and be an organ donor, to
13 which the psychiatrist opined, "All of these are reasonable and the inmate is fully
14 competent to make these decisions at this time." [*Id.*] Petitioner was assigned a
15 GAF score of 70. [MHR 1420.] On April 27, 2009, his psychologist reported
16 Petitioner appeared to be depressed, but his thinking was linear and logical.
17 [MHR 1415.] His cognition was rated as appropriate or oriented in the groups he
18 attended in April 2009. [MHR 1411-12, 1414, 1416.]

19 May 2009 progressed much in the same fashion. On May 6, 2009,
20 Petitioner appeared to have improved since the prior meeting [MHR 1410] and
21 on May 11, 2009, he was observed to be stable [MHR 1408]. Later in the month,
22 on May 20, 2009, Petitioner reported he was continuing "to do well," but was
23 concerned that he had not been able to get an advanced directive or a DNR in
24 his chart. [Doc. No. 31 at 20; MHR 1406.] The psychiatrist noted he had
25 previously written and approved Petitioner for this twice. [*Id.*] Petitioner also
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occasional truancy, or theft within the household), but generally functioning pretty well.

1 reported his tremors were “completely gone” and he was “much more
2 comfortable.” [*Id.*] He was assigned a GAF score of 70. [Doc. No. 31 at 21; MHR
3 1407.] At the end of the month, on May 26, 2009, Petitioner complained he was
4 having trouble tracking; however, his psychologist observed Petitioner’s thinking
5 to be logical. [MHR 1404.] Petitioner’s cognition during the groups he attended
6 that month was rated as oriented or appropriate. [MHR 1400-01, 1403.]

7 In early June 2009, Petitioner informed his psychologist that he wanted to
8 die, as opposed to spending another twenty-one years in prison, where he was
9 likely to die anyway. [Doc. No. 31 at 16-17; MHR 1398-99.] On both occasions,
10 his psychologist opined there was no discernable change in Petitioner’s mental
11 status. [*Id.*] On June 11, 2009, the psychiatrist noted Petitioner had refused his
12 lithium for the past ten days because his current dosage caused him to sweat
13 miserably in the hot weather, and he wanted the dosage lowered. [Doc. No. 31 at
14 14; MHR 1396.] He was assigned a GAF score of 70. [Doc. No. 31 at 15; MHR
15 1397.] Petitioner’s medications were adjusted on June 13, 2009, at which time
16 his psychiatrist felt Petitioner was in a hypomanic phase. [MHR 1384, 1394-95.]
17 The remainder of the month was unremarkable. Petitioner was observed to be
18 coherent and in touch with reality [MHR 1393], stable [MHR 1392], and on June
19 29, 2009, his psychologist reported the medication adjustment seemed to have
20 improved Petitioner’s condition [MHR 1389]. Petitioner’s cognition during groups
21 he participated in during June 2009 was rated by the facilitators as appropriate or
22 oriented. [MHR 1386-88, 1390-91.]

23 In July 2009, Petitioner was observed to be “cognitively intact,” “doing very
24 well,” stable, not confused and had poor to fair insight and judgment. [MHR 1379,
25 1381-85.] On July 10, 2009, Petitioner was not experiencing any involuntary
26 psychomotor activity, his thought process was linear and goal-directed and his
27 thought content was rational. [MHR 1380.] On July 24, 2009, Petitioner was
28 referred to a psychiatrist for a medication adjustment because he was anxious

1 and restless. [MHR 1378.] It was noted he had mild to moderate involuntary
2 tremors and was obviously uncomfortable, but his thought content was rational
3 and goal-oriented and his judgment and insight were poor to fair. [MHR 1376-78,
4 1453.] He was assigned a GAF score of 65. [MHR 1376.] On July 29, 2009,
5 reported the medication adjustment helped with his uncontrolled body
6 movements. [MHR 1372.] His cognition during groups in July 2009 was rated as
7 appropriate or oriented. [MHR 1370-71, 1373-75.]

8 Petitioner's mental health remained stable through August 2009. [MHR
9 1359-69.] On August 3, 2009, he was stable, had clear and linear thinking, and
10 presented as bright and cheerful. [MHR 1369.] Petitioner was alert, oriented and
11 coherent on August 10, 2009, as well as at a subsequent meeting on August 17,
12 2009. [MHR 1366-67.] On August 12, 2009, Petitioner made a slightly
13 inappropriate comment during a group meeting in an attempt to be humorous,
14 but quickly redirected when he noticed his comment had not been well received.
15 [MHR 1363.] On August 14, 2009, Clark's cognition was appropriate in his anger
16 management group. [MHR 1360-16.] On August 17, 2009, the psychologist wrote
17 that he was stable. [MHR 1366.] In the final days of the limitations period,
18 Petitioner was oriented and displayed appropriate cognition during a journaling
19 group on August 18, 2009 [MHR 1364], during a social issues through literature
20 group on August 19, 2009 [MHR 1363], and at anger management and current
21 events groups he attended on August 21, 2009, the final date of the limitations
22 period [MHR 1360-61.]⁸

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26 ⁸ Plaintiff's mental competency during the relevant time period is further evidenced by events
27 that transpired, such as his efforts to obtain a DNR order; his psychiatrist's opinion that
28 Petitioner was competent to make end of life decisions; Petitioner's refusal to take lithium
because of the heat, indicating both his understanding of lithium's side effects and his right to
refuse medication; and Petitioner's understanding as to he needed to take action with the VA
in order not to lose his benefits.

1 Petitioner's mental status continued to be stable until September 10, 2009,
2 when he was referred to the emergency room after suffering an anxiety attack
3 and improved immediately thereafter. [MHR 1366, 1354-1362.] Even assuming
4 Petitioner's mental state during this event rendered him incapable of filing his
5 Petition, he could not receive the benefit of equitable tolling for this episode
6 because once the limitations period ends, it cannot be revived.⁹ See e.g. *Green*
7 *v. White*, 223 F.3d 1001 (9th Cir. 2000).

8 In sum, the complete mental health records establish Petitioner suffers
9 from mental illness and, at times, his medication has caused hand and arm
10 tremors. With the exception of the eight days that passed during his mental
11 health crisis (November 13 – 20, 2008), however, neither his mental illness nor
12 medication side effects prevented him from understanding the need to timely file
13 a federal petition or from taking steps to effectuate this filing.

14 Furthermore, although the Court's discussion has primarily focused on the
15 whether Plaintiff's mental and physical impairments constitute an "extraordinary
16 circumstance," the test for an equitable tolling claim is two part. Under the
17 second part, a petitioner must show he was diligent in trying to timely file his
18 habeas petition. See e.g. *Pace*, 544 U.S 418. Here, Petitioner has made any
19 showing that he was diligent in pursuing his federal habeas claims and, thus,
20 also does not satisfy the second element of his equitable tolling claim.

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25 ⁹ Petitioner's mental health records for the 6 years, 10 months, and 14 days that passed
26 between when the limitations period ended and when the Petition was filed (August 22, 2009
27 to July 6, 2016) indicate Petitioner's mental health was stable for significant periods of time
28 and he had only a few short-lived episodes during which he was arguably not competent to file
a federal habeas petition. As explained above, even if Petitioner suffered from episodes of
impairment that prevented him from filing his Petition during this time period, they cannot toll
the limitations period after it has ended.

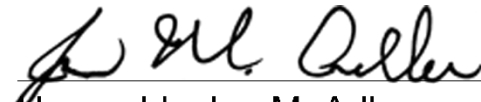
1 **III. RECOMMENDATION**

2 After a thorough review of the record in this matter, the undersigned
3 magistrate judge finds Petitioner has not shown that he is entitled to tolling of the
4 AEDPA's statute of limitations for a sufficient period of time to rendering the filing of
5 his Petition as timely. Accordingly, the undersigned magistrate judge hereby
6 recommends Respondent's Motion to Dismiss be **GRANTED**.

7 This Report and Recommendation is submitted to the Honorable Anthony
8 J. Battaglia, United States District Judge assigned to this case, pursuant to the
9 provisions of 28 U.S.C. § 636(b)(1). **IT IS ORDERED** that not later than **March**
10 **13, 2018**, any party may file written objections with the Court and serve a copy
11 on all parties. The document should be captioned "Objections to Report and
12 Recommendation." **IT IS FURTHER ORDERED** that any reply to the objections
13 shall be served and filed not later than **March 20, 2018**. The parties are advised
14 that failure to file objections within the specified time may waive the right to raise
15 those objections on appeal of the Court's order. See *Turner v. Duncan*, 158 F.3d
16 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

17 **IT IS SO ORDERED.**

18 Dated: February 26, 2018

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20 Honorable Jan M. Adler
21 United States Magistrate Judge
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